

**Remarks**

This Amendment is in response to the Office Action dated **August 19, 2009**. The Office Action rejected claims 38, 42-43, 45, 58-60, and 65 under 35 USC § 102(e) over Fischell (US 6,190,403); rejected claims 39 and 63 under 35 USC § 103(a) over Fischell in view of Kanesaka (US 5,810,872); rejected claim 46 under 35 USC § 103(a) over Fischell in view of Anderson (US 5,800,526); and rejected claims 57, 61, 62, and 64 under 35 USC § 103(a) over Fischell.

Claims 38 and 58 are amended to fix typographical errors. Specifically, a comma is added to claim 38 after the phrase, “each two adjacent strut members connected by a single curved section”. And, a comma is deleted from claim 58 before the phrase “the peaks of band-like element. . . .”

Applicants note that the above mentioned amendments are not substantive in nature, but are merely typographical.

In light of the following comments Applicants request reconsideration.

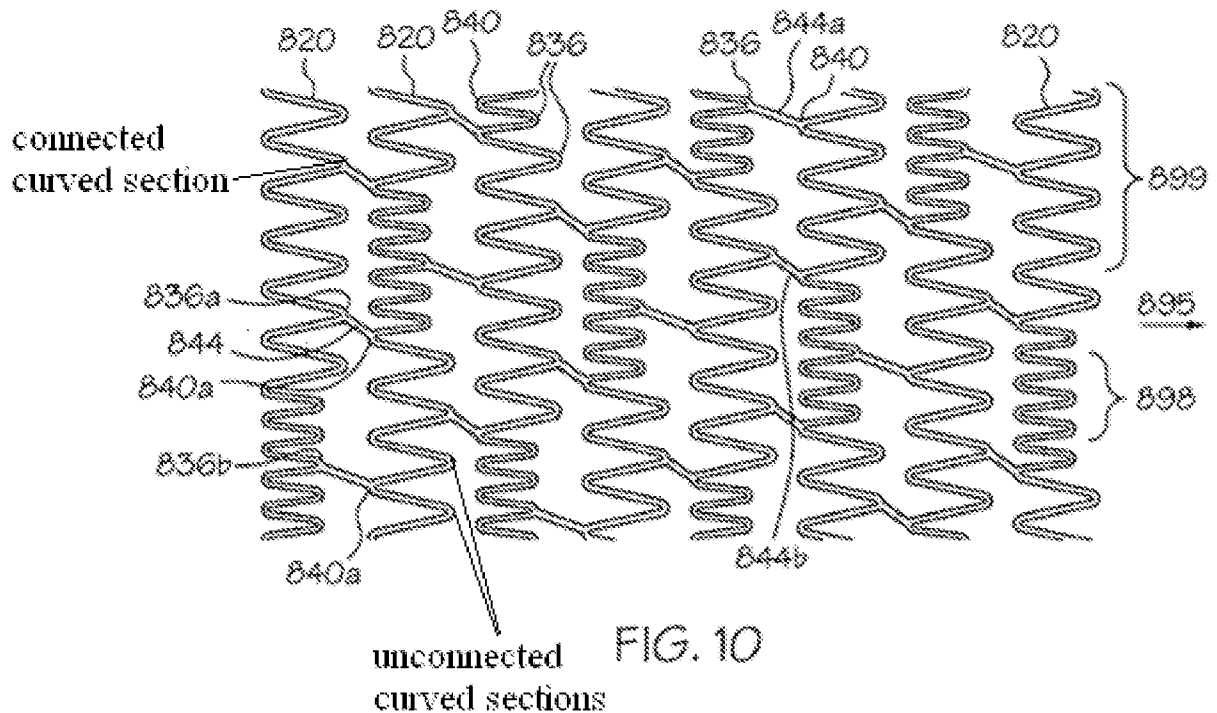
**Claim Rejections – Section 102**

In the Office Action, claims 38, 42-43, 45, 58-60, and 65 were rejected under 35 USC § 102(e) over Fischell.

In rejecting the aforementioned claims over Fischell, the Office Action provided annotated figure 9 of Fischell, shown below on page 7. With respect to the annotated figure, and Fischell, generally, Applicants note that “[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Fischell fails to disclose a host of elements claimed in the immediate claims. As such, the rejection is *traversed*.

Pursuant to MPEP section 2111, “[d]uring patent examination, the pending claims must be “given their broadest reasonable interpretation consistent with the specification.” (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316, 75 USPQ2d 1321, 1329 (Fed. Cir. 2005)). See also MPEP § 2111.01(I) (claim terms are given their plain meaning not inconsistent with the specification).

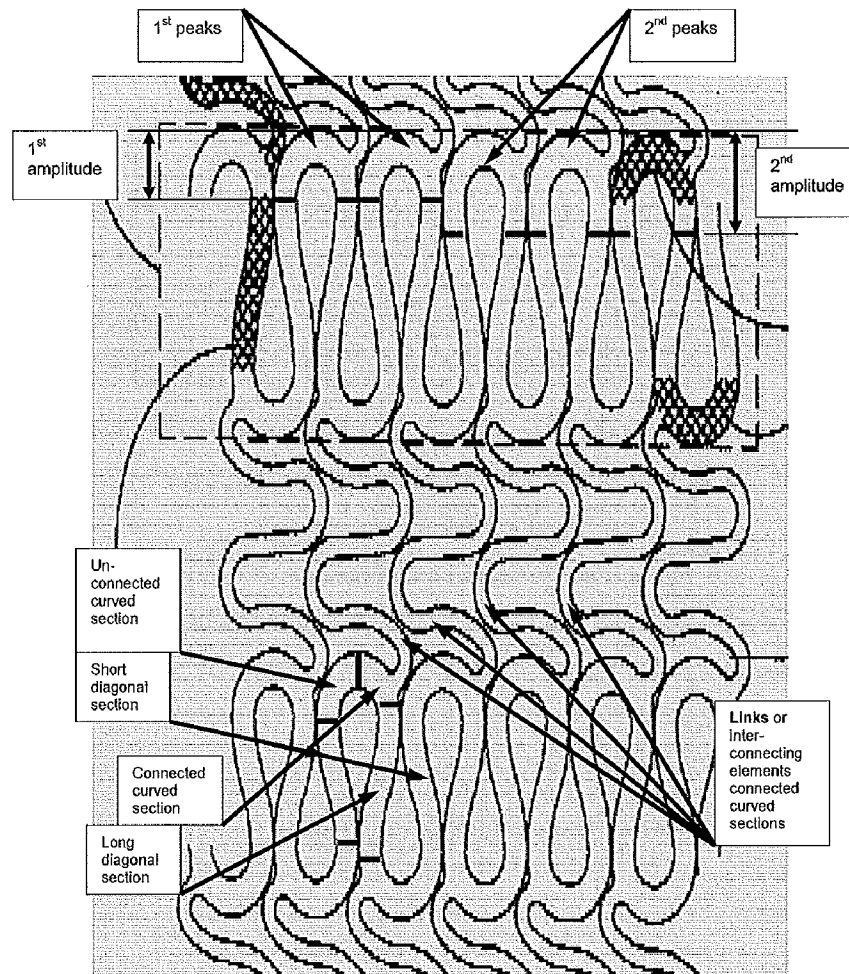
With regard to independent claim 38, as shown below for example in figure 10 of the immediate Application, each interior circumferential set of strut members includes unconnected curved sections and connected curved sections, each two adjacent strut members connected by a single curved section.



In contrast, Fischell does not disclose “connected curved sections and unconnected curved sections, each two adjacent strut members connected by a single curved section.” The Office Action’s interpretation of the aforementioned terms is inconsistent with the plain meaning. As such, Fischell at least fails to disclose unconnected curved sections.

Even if the Office Action’s interpretation is accepted, for the sake of argument only, Fischell still fails to disclose what is claimed. For example, as shown below in the Office Action’s annotated version of figure 9 (of Fischell), the alleged unconnected curved section is immediately adjacent the alleged connected curved section. As a result, even if the Office Action’s characterization of Fischell is accepted, Fischell fails to disclose “adjacent strut members connected by a single curved section.” (Emphasis added). Given the Office Action’s characterization of Fischell, any alleged two adjacent strut members are not separated by a single curved section. Indeed, any alleged two adjacent strut members appear to be separated by two

alleged curved sections (one “unconnected” and one “connected”). As such, Fischell fails to disclose “adjacent strut members connected by a single curved section,” as is claimed in claim 38 and Applicants request withdrawal of the rejection thereof.



Turning to independent claim 58, the Office Action’s rejection thereof ascribes an interpretation of the claim that is inconsistent with the plain meaning and Applicants’ Specification. In this regard, a person having ordinary skill in the art would not interpret the term “amplitude” as shown above in the Office Action’s annotated figure. Indeed, the Office Action’s interpretation of first and second amplitudes appears to be wholly arbitrary.

In contrast, as shown above in figure 10 of the immediate Applicant, the peaks of each band-like element comprise peaks having a first amplitude that is less than a second amplitude. Fischell simply does not disclose this claimed element. As such, Applicants request withdrawal of the rejection of claim 58.

With regard to dependent claims 42-43, 45, 59, 60, and 65, these claims depend either directly or indirectly from claims 38 and 58, respectively. These claims are therefore patentable for at least the reasons discussed with respect to independent claims 38 and 58 and Applicants request withdrawal of the rejection.

### **Claim Rejections – Section 103**

#### Claims 39 and 63

In the Office Action, claims 39 and 63 were rejected over Fischell in view of Kanesaka. This rejection is *traversed*.

Dependent claims 39 and 63 depend from claims 38 and 58, respectively. Kanesaka does not remedy the deficiencies of Fischell as discussed above. Therefore, claims 39 and 63 are patentable for at least the reasons discussed above with respect to independent claims 38 and 58. Consequently, Applicants request withdrawal of the rejection.

#### Claim 46

In the Office Action, claim 46 was rejected over Fischell in view of Anderson. This rejection is *traversed*.

Dependent claim 46 depends from claim 38, respectively and Anderson does not remedy the deficiencies of Fischell as discussed above. Therefore, claim 46 is patentable for at least the reasons discussed above with respect to independent claim 38. Consequently, Applicants request withdrawal of the rejection.

#### Claims 57, 61, 62, and 64

In the Office Action, claims 57, 61, 62, and 64 were rejected over Fischell. This rejection is *traversed*.

In rejecting the aforementioned claims the Office Action asserts, “Fischell-‘403 discloses substantially all the limitations of the claimed invention, except for some minor modifications as recited in the claims. There is no evident [sic] that these modifications will significantly improve the performance of Fischell-‘403.” Page 4, paragraph 3.

The Office Action has failed to establish a *prima facie* case of obviousness. What

is required to establish a *prima facie* case of obviousness under 35 USC § 103(a) is a “clear articulation of the reason(s) why the claimed invention would have been obvious.” MPEP § 2142. As further stated in MPEP § 2142:

[t]he Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 418, 82 USPQ2d 1385, 1396 (2007) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Federal Circuit has stated that “rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

MPEP § 2142 also requires that the Office Action provide factual support in making out a case of *prima facie* obviousness.

With regard to claims 57, 61, 62, and 64, the Office Action has failed to satisfy the requirements set forth in 35 USC § 103, as interpreted by the Supreme Court. Moreover, the Office Action’s rejection appears to require Applicants to affirmatively prove patentability. This requirement does not belong to Applicants. Indeed, under 35 USC §§ 102 and 103, Applicants’ are “entitled to a patent unless” the claimed invention is shown to lack novelty or is shown to be obvious in light of the prior art. 35 USC § 102 (emphasis added). As the Office Action has failed to provide evidence showing how the aforementioned claims are obviousness in light of Fischell, Applicants request withdrawal of the rejection.

### **Claims 66-70**

With regard to claims 66-70, it appears that the Office Action did not provide substantive rejections thereof. Pursuant to 37 CFR §§ 1.104(b) and 1.104(c)(2), Applicants request that any subsequent Office Action provide substantive examination of the aforementioned claims. In addition, Applicants request that the finality of the immediate Office Action be withdrawn and further request, in the absence of a Notice of Allowance, that Applicants be provided with a subsequent Office Action in compliance with the rules set forth in 37 CFR §§ 1.104(b) and 1.104(c)(2). This will allow Applicants the opportunity to respond to specific rejections of these claims, in the event that these claims are not allowed.

**Conclusion**

Based on at least the foregoing remarks, Applicant requests withdrawal of the rejections and allowance of claims 38, 39, 42, 43, 45, 46, and 57-70. Favorable consideration and prompt allowance of these claims is earnestly solicited.

Should the Examiner believe that anything further would be desirable in order to place this application in better condition for allowance the Examiner is invited to contact Applicant's undersigned representative at the telephone number listed below.

Respectfully submitted,

VIDAS, ARRETT & STEINKRAUS

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